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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1970

No. 6370, O.T. 1970

KENNETH RAY BLANTON ..... Petitioner

v.

STATE OF ARKANSAS ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

QUESTIONS PRESENTED

1. Whether an indigent criminal defendant is entitled to public funds for necessary investigative, psychiatric, and other services.

2. Whether the petitioner, a white man, has standing to raise the question of discrimination against blacks in the jury-selection process.

3. Whether a person in custody can effectively waive his right to remain silent when the interrogating officer has misled him with respect to the charges pending against him.

4. Whether the prosecuting attorney, in his closing argument to the jury, may refer to defendant's having exercised his constitutional right to remain silent before trial.

REASONS FOR DENYING THE WRIT

1. WHETHER AN INDIGENT CRIMINAL DEFENDANT IS ENTITLED TO PUBLIC FUNDS FOR NECESSARY INVESTIGATIVE, PSYCHIATRIC, AND OTHER SERVICES.

This point presents no substantial federal question in need of decision by this Court, and therefore certiorari should not be granted. There are no conflicting decisions among the various jurisdictions around the country with regard to this point. Ancillary services of the type requested by petitioner have never been provided at public expense. No court, either state or federal, has held that either the Sixth Amendment, due process clause, or equal protection clause is broad enough to compel this type of assistance.

While this Court has led the way in assuring that indigent defendants receive adequate legal counsel, it has never gone so far as to require the public to bear all the expenses incurred incident to the preparation of a defense. If a defendant has a right to legal counsel, for example, does he then have a right to the very best legal counsel available? Surely not. Due process requires fundamental fairness, but does not require the state to furnish the best of everything. It does not require the state to, in effect, prepare the accused's defense for him. The right to counsel guaranteed by the Sixth Amendment has been extended to the states through the Fourteenth Amendment, but that right has wisely been limited to legal counsel.

In *United States ex rel. Smith v. Baldi*, 192 F. 2d 540 (3rd. Cir. 1951), the contention was made that the defendant was denied due process of law because he was not provided with expert psychiatric assistance at public expense. The Third Circuit Court of Appeals rejected this argument.

The problems inherent in this contention were stated at page 547:

> Furthermore, we have great difficulty in accepting as a proposition of constitutional law that one accused of crime is entitled to receive at public expense all the collateral assistance needed to make his defense. Here Smith was, at public expense, given two thoroughly competent lawyers. The same argument that would entitle them to psychiatric consultation would entitle them to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant. We do not think the requirements of due process go so far.

The petitioner contends that he was denied due process and equal protection because the state did not bear the expense of providing him with psychiatric assistance. His contention is not that he was insane (Arkansas law makes provision for free psychiatric examination in this instance), *but rather that the crime was homosexual in nature, and therefore psychiatric advice was necessary to properly prepare a defense.

Any criminal activity, in fact almost all human activity, has psychological overtones. Yet it cannot be seriously

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*Ark. Stat. Ann. Sec. 43-1301 et seq. make provision for a psychiatric examination at the Arkansas State Hospital when sanity is an issue. The Arkansas Supreme Court has ruled that examination by psychiatrists on the State Hospital staff is not a denial of due process or equal protection, because the determination of mental competency of criminal defendants was only incidental to their primary duties of treating mental diseases, and because the staff is appointed by the Governor or through his appointees and is not in any way controlled by those charged with prosecuting criminal defendants. Hale v. State, 246 Ark. 961, 440 S.W. 2d. 550 (1969). A similar result has been reached in the federal courts. McGarty v. O'Brian, 188 F. 2d. 151, 157 (1st Cir. 1951).

contended that a psychologist or a psychiatrist is needed in every criminal case in order to direct the jury to a correct determination of guilt or innocence. Assuming that brutal murders of the type involved in this case are frequently committed by homosexuals, it does not necessarily follow that all such murders are committed by homosexuals. A case should not be decided on the basis of probability, but rather on its individual facts. Therefore, it is difficult to see how petitioner was prejudiced by the denial of expert psychiatric assistance.

Certainly the state should not be compelled to provide investigative services for criminal defendants. Under our legal system, a defendant is presumed to be innocent, and the state bears the burden of proving guilt beyond a reasonable doubt. Furthermore, a traditional part of the function of an attorney has been facts investigation and development. Obtaining necessary witnesses should no longer pose a problem, for this court has held that an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor is applicable to the states through the Fourteenth Amendment. *Washington v. State of Texas*, 388 U. S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967).

The petitioner contends that he was denied equal protection of the law because he was not furnished collateral assistance at public expense. The issue, therefore, is whether the denial of collateral assistance constitutes an invidious discrimination against the defendant because of his poverty. Although lawyers and judges may be reluctant to admit it, we should realize that a certain amount of discrimination is inherent in our judicial system. A man of wealth can retain the very best legal counsel available, can hire private investigators, ballistics experts, medical experts, accountants or anyone else who would be helpful in the

preparation of his case. A man of moderate means, although able to retain legal counsel of his own choice, may not be able to afford these other experts. Yet it has never been contended, to the knowledge of this writer, that the man of lesser means who has nonetheless retained his own attorney should be provided at public expense all the collateral assistance he deemed necessary in the preparation of his case. Therefore, it is difficult to see why the petitioner, an indigent, should be entitled to these services. If assistance of this type is granted to indigents, then it will surely have to be granted to all, and the only criminal defendants of the future who will not derive assistance at public expense will be the extremely wealthy. It is the contention of the appellee that if any discrimination has resulted from the denial of furnishing psychiatric, investigative and other services to the petitioner, it is not an invidious discrimination within the meaning of the equal protection clause; rather, it is the inherent discrimination arising from the economic realities of life.

An impartial criminal process is something which all people in a democratic society should strive to attain, and justice without regard to one's poverty should be our ideal. But the quest for any ideal must be tempered with reason and common sense. While increased services for indigent defendants might appear desirable, the infeasibility of the proposal must be recognized. While due process requires fundamental fairness, a state should not be compelled to prepare an accused's defense for him. Under our legal system that job has properly been left to the defendant and his attorney.

2. WHETHER THE PETITIONER, A WHITE MAN, HAS STANDING TO RAISE THE QUESTION OF DISCRIMINATION AGAINST BLACKS IN THE JURY-SELECTION PROCESS.

It is appellee's contention that the petitioner, a white man, has no standing to complain about the exclusion of blacks from the jury panel, if such exclusion in fact occurred. In *Fay v. New York*, 332 U.S. 261, 287, 91 L. Ed. 2043, 2059 (1947), it was said:

> This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. *Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.Ed. 899, 900, 26 S.Ct. 560, 5 Ann. Cas. 783 Cf. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 644. Relief has been held unavailable to a Negro who objected that all white persons were purposely excluded from the grand jury that indicted him. *Haraway v. State*, 203 Ark. 911, 159 S.W. 2d 733.

The 5th Circuit Court of Appeals has ruled upon the specific issue in question here, holding that a white man does not have standing to raise the issue of discrimination against blacks in the jury selection process in a state prosecution. *Salisbury v. Grimes*, 406 F. 2d 50 (5th Cir. 1969); *Woodruff v. Breazeale*, 291 F. Supp. 130 (N.D. Miss. 1951), affirmed 401 F. 2d 997 (5th Cir. 1968). In the *Salisbury* case, supra, the 5th Circuit stated at page 51:

> A jury infected by racial bias or prejudice cannot be fair and impartial to one of another race . . . . Correspondingly, there can be no racial prejudice between members of the same race. In such cases there may be prejudice for reasons innumerable but not racial prej-

udice. This may be the reason that the Supreme Court "has never entertained a defendant's objections to exclude from the jury except when he was a member of the excluded class", *Fay v. New York*, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1937).

In a case involving alleged religious discrimination against atheists, arising in the State of Maryland, the 4th Circuit Court of Appeals held that one who professed a strong belief in God did not have standing to challenge the systematic exclusion of atheists from the state jury panel. *Smith v. State of Maryland*, 362 F. 2d 763 (4th Cir. 1966).

Petitioner relies upon *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) and *Ballard v. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946), as authority for his position that he has standing to raise the issue of discrimination. It should be noted that these cases dealt with federal juries, not state juries. It is well established that federal courts may exercise supervisory powers within the federal system that exceed the requirements of due process. This is pointed out in *Fay v. United States*, supra, at page 287:

> These defendants rely heavily on arguments drawn from our decisions in *Glasser v. United States*, 315 U.S. 60, 87 L. Ed. 680, 62 S. Ct. 457; *Thiel v. Southern P. Co.*, 328 U.S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A.L.R. 1412, and *Ballard v. United States*, 329 U.S. 187, ante, 181, 67 S. Ct. 261. The facts in the present case are distinguishable and vital in obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal

> proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.

This distinction was noted in *Woodruff v. Breazeale*, supra. See also *United States v. Butera*, 420 F. 2d 564 (1st Cir. 1970), n. 2. p. 567, and cases cited therein.

Even if the petitioner is deemed to have standing to raise the issue of discrimination against blacks, however, his contention should be rejected because he has not shown that the alleged discrimination was prejudicial to him. Although discrimination against a member of an excluded class might be sufficient to establish prejudice *per se*, a non-member of that class should not be permitted to raise the issue absent a showing that he was in fact prejudiced by such exclusion. Therefore, certiorari should be denied on this point.

3. WHETHER A PERSON IN CUSTODY CAN EFFECTIVELY WAIVE HIS RIGHT TO REMAIN SILENT WHEN THE INTERROGATING OFFICER HAS MISLED HIM WITH RESPECT TO THE CHARGES PENDING AGAINST HIM.

Certiorari should be denied on this point because the evidence clearly indicates that petitioner was not misled, and that any statements made by him were freely and voluntarily made after he had been advised of his constitutional rights. The Arkansas Supreme Court determined this issue in the opinion below. Page 9(a) of the appendix to petitioner's brief, the Arkansas Court stated:

The evidence indicates that neither Officer Newman

of the Texas Highway Patrol, nor Justice of the Peace Rose, solicited or attempted to solicit incriminating information from the appellant. The evidence is to the effect that after the appellant was fully warned of his constitutional right, he voluntarily attempted to explain his possession of the Chrysler automobile, the wallet and wristwatch, none of which belonged to him. He made no statements, nor were any statements solicited from him in Texas concerning the charge on which he was tried. The statements he did make were voluntarily made and the trial court so found at a thorough evidentiary hearing.

It is respectfully submitted that this point presents a question of fact rather than one of law, and that this question of fact was correctly resolved by the trial court and affirmed by the Supreme Court of Arkansas. Therefore, no substantial federal question is presented, and certiorari should be denied.

4. WHETHER THE PROSECUTING ATTORNEY, IN HIS CLOSING ARGUMENT TO THE JURY, MAY REFER TO DEFENDANT'S HAVING EXERCISED HIS CONSTTUTIONAL RIGHT TO REMAIN SILENT BEFORE TRIAL.

This point presents no substantial question for decision by this court. The petitioner testified in his own defense at the trial. The remark complained of was not directed at a failure of the petitioner to testify at his own trial, but rather at his silence during the preliminary investigation. After the remark was made the trial court gave a thorough and complete instruction to the jury with regard to the defendant's 5th Amendment right to remain silent, and instructed the jury that they could not draw any inferences

from the defendant's failure to make any statement or exculpatory remark. Therefore, it is difficult to perceive how the defendant could have been prejudiced in any way by the prosecutor's remark.

CONCLUSION

The Petition for a Writ of Certiorari presents no serious constitutional issue in need of decision by this Court. Since no substantial federal questions are presented, the respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

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